U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 16 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked, and the labor certification invalidated, by the Director. The case is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). Some of the Director's findings, and the invalidation of the labor certification, will be withdrawn. For the reasons discussed hereinafter, however, the appeal of the revocation decision will be dismissed.

The petitioner is a real estate and mortgage brokerage firm. It seeks to permanently employ the beneficiary in the United States as an administrator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on January 10, 2007. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, that was filed with the U.S. Department of Labor (DOL) on June 16, 2006, and certified by the DOL on July 7, 2006.

The petition was initially approved on June 12, 2007. The approval was subsequently revoked by the Director in a decision dated December 22, 2011, on the grounds that the beneficiary did not meet the minimum educational and experience requirements for the subject position, as specified on the labor certification. In particular, the Director found that the record failed to establish that the beneficiary has a bachelor's degree in "business administration in accounting" (or a foreign educational equivalent), as specified on the ETA Form 9089, and failed to establish that the beneficiary had at least five years of post-baccalaureate experience in the job offered by the priority date of June 16, 2006, which is the date the labor certification application was accepted for processing by the DOL. In connection with these findings the Director indicated that the petitioner could not change the visa classification of the petition to skilled worker or professional to facilitate approval for the beneficiary. In addition, the Director found that the beneficiary made willful misrepresentations of material fact concerning his employment experience on the labor certification and other documentation in the record, and invalidated the ETA Form 9089 with a finding of fraud. Without a valid labor certification, an employment-based immigrant petition cannot be approved under any circumstances.

The petitioner filed a timely appeal, along with a brief from counsel and supporting documentation, which are now before the AAO. The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On December 19, 2012, the AAO issued a Notice of Intent to Dismiss (NOID), advising the petitioner of its intent to dismiss the appeal. Aside from the reasons discussed by the Director, the AAO indicated that the record did not establish the petitioner's continuing ability to pay the offered wage from the priority date up to the present. Furthermore, the petitioner's insistence that the labor certification requirements of a bachelor's degree and five years of experience in the job offered could be satisfied with pre-baccalaureate experience did not correlate with the petitioner's designation of the petition on the Form I-140 as being filed for "a member of the professions holding an advanced degree." The petitioner was given 30 days to respond to the NOID and submit additional evidence. The petitioner responded on January 7, 2013, with a brief from counsel and federal income tax documentation for the years 2006-2011.

The first issue the AAO will address is whether beneficiary meets the educational and experience requirements for the proffered position, as specified on the labor certification. To be eligible for the immigration benefit sought in this petition the beneficiary must possess all the education, training, and experience required on the labor certification as of the priority date. *See Matter of Katigbak,* 14 I&N Dec. 45 (Comm. 1971); *Matter of Wing's Tea House,* 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The priority date, as previously stated, is the date the underlying labor certification application, the ETA Form 9089, was received for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The priority date in this case is June 16, 2006.

As stated on the ETA Form 9089, the minimum educational requirement for the job of administrator is a bachelor's degree in "business administration in accounting" or a foreign educational equivalent (Part H, lines 4, 4-B, and 9). The minimum experience requirement is 60 months (five years) in the job offered (Part H, line 6). There is no training requirement (Part H, line 5).

As evidence of the beneficiary's educational credentials in Ecuador, the record includes photocopies of the following Spanish-language documents, along with certified English translations:

- A letter from an official of [redacted] in Quito, dated December 13, 2005, certifying that (1) the beneficiary began his university studies in the first semester of the 1989-90 school year and finished his studies in the field of business administration (with the title of *Ingenieria en Administracion de Empresas*) in the first semester of the 1995-96 school year, (2) after completing the requisite examinations the beneficiary received the title of Authorized Public Accountant (*Contador Publico Autorizado*) on March 14, 2003, and (3) after defending his thesis orally the beneficiary obtained the degree of Commercial Engineer with specialization in Marketing (*Ingeniero Comercial con especializacion en Marketing*) on January 11, 2005.

- A diploma from [redacted] awarding the beneficiary the title of Certified Public Accountant (*Titulo de Contador Publico Autorizado*) on February 13, 2003.

- A diploma from [redacted] awarding the beneficiary the title of Commerical Engineer with specialization in Marketing (*Titulo de Ingeniero Comercial con Mencion en Marketing*) on January 11, 2005.

- An academic transcript from the [redacted] dated November 10, 2011, listing the courses completed by the beneficiary in the School of Business Administration from the first semester of 1988 through the first semester of 2002. Most of the courses were completed by 1995, but four (financial accounting, financial administration, auditing, and market research) were completed in 1999 and two (company policy and marketing) were completed in 2002.

The record also includes two evaluations of the U.S. equivalency of the beneficiary's university education in Ecuador. They include evaluations by:

- Education Evaluators International, Inc. (EEI) of Los Alamitos, California, dated January 16, 2006, which concluded that the beneficiary's professional titles of *Contador Publico Autorizado* and *Ingeniero Comercial* are, in combination, equivalent to a Bachelor of Science in Business Administration with concentrations in Accounting and Marketing from an accredited U.S. college or university.

- Morningside Evaluations and Counseling (Morningside) in New York City, dated December 20, 2006, which concluded that the beneficiary's second professional title is equivalent to a Bachelor of Business Administration in the United States.

As a further resource to evaluate the U.S. equivalency of these educational credentials, the AAO has consulted the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[1] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

As stated in EDGE's section on Ecuador, a *Titulo de Contador Publico* and a *Titulo de Ingeniero* are professional titles of public accountant and engineer, respectively. They are first professional

[1] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

degrees awarded upon completion of 5- to 6-year academic programs. According to EDGE, these credentials are each comparable to a bachelor's degree in the United States. Thus, the EEI and Morningside evaluations, while not identical, are essentially confirmed by EDGE.

In the revocation decision the Director determined that evidentiary discrepancies in the record precluded a finding that the beneficiary received any degree from the [redacted] The AAO has reviewed the documentation submitted by the petitioner and comes to a different conclusion. The inconsistencies cited by the Director were minor in nature and, in the AAO's view, adequately explained by counsel on appeal. The beneficiary's academic credentials appear genuine. EEI and Morningside both rate the beneficiary's education as equivalent to a U.S. bachelor's degree in business administration. The EEI and Morningside evaluations are also consistent with EDGE, a resource that was overlooked by the Director. The AAO concludes, therefore, that the beneficiary meets the educational requirement for the proffered position as specified in the ETA Form 9089. This part of the Director's decision will be withdrawn.

With respect to the experience requirement of the ETA Form 9089, the petitioner claims that the beneficiary has more than five years of qualifying experience with a company called Sign Express in Quito, Ecuador. The regulation at 8 C.F.R. § 204.5(g)(1) provides that:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or the training received.

The record includes a statement on the letterhead of [redacted] from a certified public accountant (CPA), [redacted] dated October 2006, stating that the beneficiary was employed by the company from October 5, 1998 until June 16, 2006, initially as Assistant to the Administrator and later as Administrative Director, and describing his duties. The statement is unclear, however, as to [redacted] exact relationship with [redacted] It does not state whether he is an employee of the company or its hired CPA. Absent clarity on this issue, the AAO cannot accept the letter as being from a current or former employer, as required in the regulation. The record also includes a statement dated July 8, 2010, from the owner of [redacted] [redacted] (whom the beneficiary married in May 2001), which affirmed the beneficiary's dates of employment as October 5, 1998 to June 16, 2006, and his progression from Assistant to Administrator to Administrative Director, but neglected to describe his job duties. Thus, the statement fails to meet a crucial substantive requirement of the regulation. For the reasons discussed above, neither statement accords with the regulatory requirements of 8 C.F.R. § 204.5(g)(1), and neither constitutes persuasive evidence of the beneficiary's employment history with [redacted]

In addition to the evidentiary shortcomings discussed above, neither of the statements indicates when the beneficiary was promoted to Administrative Director. Even if the AAO accepted one or both of the statements as credible evidence of the beneficiary's employment by [redacted] from 1998 to 2006, the record is unclear as to how much of the time was served in the capacity of Administrative Director. The job duties of the Administrative Director for [redacted] as described in the CPA's letter and in the ETA Form 9089, closely parallel the duties of the proffered position – Administrator – as described in the ETA Form 9089. Experience at [redacted] as an Administrative Director might qualify as experience in the job offered. Experience at [redacted] as Assistant to the

Administrator, however, would involve different, lower level, job duties that would likely not qualify as experience in the job offered. Since the petitioner has submitted no evidence clarifying when the beneficiary became the Administrative Director of [redacted] there is no basis to conclude that the beneficiary would have amassed five years of experience in the job offered before the priority date of June 16, 2006.

Aside from the deficient statements of the petitioner's CPA and president, the record includes extensive documentation pertaining to [redacted] and the beneficiary's association with the company between 1998 and 2006, including tax and payroll records. None of this documentation, however, identifies the beneficiary's specific job title or duties. Furthermore, as pointed out by the Director in the revocation decision, U.S. Citizenship and Immigration Services (USCIS) records show that the beneficiary spent considerable time in the United States on L-2 and B-2 visas – seven different stays totaling well over a year – between October 5, 2003 and January 30, 2006. Counsel acknowledges that this fact was not stated up front in these proceedings by the petitioner or the beneficiary, but asserts that the fact is not material to the current petition because the beneficiary continued to work for [redacted] remotely – by phone and email – during his stays in the United States. It strains credulity, however, to imagine that the beneficiary would have continued to work full-time for a company in Ecuador during his extended stays in the United States, as claimed by the petitioner and the beneficiary on the ETA Form 9089 (which states that the beneficiary was employed by [redacted] 40 hours per week uninterruptedly from October 1998 to June 2006). As further evidence that the beneficiary could not have worked full-time for [redacted] for the entire period claimed in the ETA Form 9089, the Director points to the beneficiary's unsuccessful effort to obtain an L-1A visa in 2005 through another Ecuadorean business – [redacted] – for whom he had worked many years. The beneficiary did not list this employment experience on the ETA Form 9089 that was filed in June 2006, despite the directions on the form to list all employment experience in the past three years. Counsel describes this omission as a harmless error that is not material to the instant I-140 petition, and points out that many Americans also have two jobs.

Notwithstanding counsel's efforts to present the documentation of record in the best possible light, the basic fact remains that the evidence submitted in support of this petition fails to establish that the beneficiary had five years of experience in the job offered by the priority date of June 16, 2006. Thus, the petitioner has failed to establish that the beneficiary meets the experience requirement of the ETA Form 9089 to qualify for the proffered position. On this ground alone the petition cannot be approved.

Even if the beneficiary met the experience requirements of the labor certification, the beneficiary would still not be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he clearly does not have five years of post-baccalaureate experience, as required in the definition of "advanced degree" at 8 C.F.R. § 204.5(k)(2). The regulation provides that a U.S. or foreign equivalent bachelor's degree can be considered the equivalent of a master's degree only if it is "followed by five years of progressive experience in the specialty." *Id.* (emphasis added). The beneficiary did not receive the first of his two bachelor's degree equivalent professional titles in Ecuador until February 2003 – which was three years and four months before the petition's priority date of June 16, 2006. Thus, the beneficiary cannot fulfill the experience requirement necessary to vault a foreign equivalent bachelor's degree into an advanced degree for the purpose of classification under section 203(b)(2) of the Act.

In the petitioner's response to the NOID on November 22, 2011, counsel acknowledged that the beneficiary does not qualify for classification as an advanced degree professional because it was impossible for him to amass five years of post-baccalaureate experience by the priority date. Counsel requested that USCIS change the preference classification from advanced degree professional to skilled worker or professional to facilitate the approval of the petition. This change request was repeated in counsel's appeal brief and in his response to the NOID issued by the AAO. Counsel's request cannot be granted.

As stated by the Director in the revocation decision, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). On the Form I-140 the petitioner indicated at Part 2.d. that the petition was being filed for "[a] member of the professions holding an advanced degree." The option of filing the petition for a "professional" or a "skilled worker" (Part 2.e.) was not checked. Accordingly, the beneficiary must have an advanced degree as defined in 8 C.F.R. § 204.5(k)(2) to be eligible for approval. Since he does not, the petition cannot be approved. The AAO affirms the Director's finding on this issue.

Moreover, even if the AAO were to consider the petition under the professional or skilled worker category, the evidence of record does not establish that the beneficiary has the requisite work experience as specified in the labor certification to qualify for the job. *See supra*.

With regard to the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

As stated on the ETA Form 9089, Box G, the offered wage for the administrator position is $32.05 per hour, which amounts to $66,664 per year (based on a work year of 2,080 hours).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

At the time of the appeal there was no evidence in the record of the petitioner's ability to pay the proffered wage at any time from the priority date (June 16, 2006) onward. Therefore, in the NOID it issued on December 19, 2012, the AAO advised the petitioner to submit copies of its federal income tax returns for each of the years 2006-2011. In addition, if the beneficiary has been employed by the petitioner at any time since the priority date, the petitioner was advised to submit specific evidence documenting its pay to the beneficiary for any and all such years. In response to the NOID counsel stated that the beneficiary has never been employed by the petitioner and submitted unsigned copies of the following tax documents:

- Two Forms 1065, U.S. Return of Partnership Income, in the petitioner's name for the years 2006 and 2007.

- Four Schedule Cs, Profit or Loss from Business, excerpted from the Forms 1040, U.S. Individual Income Tax Returns, of the petitioner's sole member for the years 2008-2011.

The petitioner is an LLC (limited liability company) organized under Florida state law. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, as in this case, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election is made using IRS Form 8832, Entity Classification Election.

In the instant case, the petitioner filed a Form 1065, U.S. Return of Partnership Income, for the years 2006 and 2007. The forms identify [redacted] as the sole member with 100% ownership of the company, and do not include any IRS Forms 8832. For the years 2008-2011 the petitioner's income was reported on Schedule C of [redacted] individual income tax returns, Forms 1040, which is permitted by IRS rules.

An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.[2] An investor's liability is limited to his or her initial investment. As the owners are only liable to the extent of their initial investment, the total income and assets of the owners and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part

[2] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual income tax return (Form 1040) each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Therefore, while single-member LLCs and sole proprietorships often file tax returns in a similar fashion – *i.e.* using Schedule C to the Form 1040 – the assets and income of these two types of business entities are analyzed in different ways.

In determining a petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, counsel states that the beneficiary has never been employed by the petitioner up to now. Thus, the petitioner cannot establish its ability to pay the proffered wage based on any compensation it actually paid to the beneficiary from the priority date (June 16, 2006) up to the present.

As an alternative means of determining the petitioner's ability to pay, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (accessed March 28, 2011) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule Ks for 2006 and 2007 have several entries and, therefore, its net income for those years is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

For 2006 and 2007 the petitioner's "ordinary business income (loss)" – entered on page 4, line 1 of the Form 1065 – was $48,441 (2006) and $64,941 (2007), respectively. These figures were both below the proffered wage of $66,664 per year. For the years 2008-2011 the petitioner's "net profit

(loss)" – entered on line 31, Schedule C, of the Form 1040 – was $21,841 (2008), $24,830 (2009), $30,783 (2010), and $24,664 (2011). These figures were all far below the proffered wage of $66,664 per year. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Thus, the tax documents submitted by the petitioner are insufficient to establish its ability to pay the proffered wage in the years 2006-2011.

In determining the petitioner's ability to pay the proffered wage, USCIS may also consider evidence relevant to a petitioner's ability to pay that falls outside of adjusted gross income, or net income. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).[3] USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker or an outsourced service, or any other evidence that USCIS deems relevant. In this case, however, there is little or no evidence of the petitioner's business history or financial standing aside from the income tax filings discussed above (four of which are incomplete, and none of which bears a signature or official marking to confirm of its authenticity). The evidence of record does not establish that the totality of the petitioner's circumstances, as in *Sonegawa*, demonstrates an ability to pay the proffered wage from the priority date (June 16, 2006) up to the present.

For all of the reasons discussed above, the AAO concludes that the record fails to establish the petitioner's continuing ability to pay the proffered wage of $66,664 per year from the priority date up to the present. For this reason as well, the petition cannot be approved, and was properly revoked. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ* (noting that the AAO conducts appellate review on a *de novo* basis).

Finally, the AAO agrees with the Director that there are evidentiary discrepancies in the record. In the AAO's view, however, they do not rise to the level of fraud or the willful misrepresentation of material facts, and are not material to the adjudication of the instant petition. Accordingly, the AAO does not agree with the Director's finding of fraud and willful misrepresentation of material fact(s)

---

[3] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

by the beneficiary. This part of the Director's decision, along with the invalidation of the labor certification, will be withdrawn.

Conclusion

The appeal of the revocation decision will be dismissed on the following grounds:

- The petitioner has failed to establish that the beneficiary had five years of experience in the job offered as of the priority date (June 16, 2006), as required to qualify for the proffered position under the terms of the labor certification.

- The beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he did not have five years of qualifying post-baccalaureate experience by the priority date of June 16, 2006, as required for his U.S. equivalent bachelor's degree(s) to meet the definition of an advanced degree under 8 C.F.R. § 204.5(k)(2).

- The petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present.

As always in visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: For the reasons listed above, the appeal of the revocation decision is dismissed. The invalidation of the labor certification, ETA Form 9089, is withdrawn.